ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
of the Telecommunications Act of 1996	)	

REPLY COMMENTS OF U S WEST, INC.

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SUMMARY

Commenters motivated by the potential opportunity to flash cut ILEC special access rates to regulator-determined TELRIC prices have asserted that the 1996 Act makes UNEs available for any and all purposes, and that there is no legal basis for imposing any limitation. This absolutist interpretation of the Act's unbundling requirements is refuted by the terms of the statute, the Supreme Court's decision in *Iowa Utilities Board*, and even the Commission's decision in the recent UNE Remand Order.

The impairment test set forth in section 251(d)(2) -- a provision that advocates of the absolutist position studiously ignore -- not only permits but indeed compels limitations on the availability of UNEs. That section, as interpreted by the Supreme Court, calls for UNEs to be made available only where lack of access to UNEs would truly impair the ability of requesting carriers to provide the *particular services they seek to offer*. Accordingly, the particular service that a requesting carrier seeks to offer is necessarily a key factor in determining whether or not unbundling is required. As U S WEST discussed in its opening comments, where a requesting carrier seeks to provide (or self-provide) special access -- and particularly where the carrier already does so using tariffed services and now wants UNEs merely to obtain a lower price for the same functionality -- lack of access to UNEs would not cause material impairment and unbundling should not be required.

Commenters arguing for the opposite result point to section 251(c)(3) and selected passages from the Commission's First Local Competition Order. But section 251(c)(3) does not and cannot override section 251(d)(2), and, in any event, nothing in the text of section 251(c)(3) prohibits use-related limitations on the availability of UNEs. To the contrary, by authorizing the Commission to impose just and reasonable conditions on the availability of UNEs, section

251(c)(3) creates a sound and independent legal basis for such limitations. As to the First Local Competition Order, the Supreme Court's decision in *Iowa Utilities Board* plainly requires the Commission to revisit its 1996 analysis -- an analysis which in any case did not find all use-related limitations to be prohibited, contrary to the suggestion of some commenters. The Commission's decision in the recent UNE Remand Order to make the switching UNE available for some uses but not others confirms that there is no merit to the absolutist interpretation.

Commenters in favor of unrestricted special access arbitrage likewise argue, ignoring the fact that the special access market is widely competitive, that there is no policy basis for limiting the availability of UNEs for special access purposes. But the policy reasons for imposing such a limitation are clear and compelling. First, driving special access rates down by permitting carriers to demand that services currently obtained at tariffed rates be made available immediately at regulator-determined TELRIC prices would be equivalent to reducing special access rates through a rate prescription -- an approach that the Commission has rejected as economically inefficient and as particularly unwarranted in markets where competition is developing. Second, far from impairing competition, preventing a flash cut to TELRIC special access prices would promote competition by preserving incentives for continued investment in competitive special access facilities. Third, contrary to the argument of some commenters, the universal service consequences of a flash cut to TELRIC for special access would be real and significant. Finally, limiting the availability of UNEs as a substitute for special access would not pose any great administrability problems.

Accordingly, the Commission should adopt a rule that limits the availability of loop and transport UNEs as a substitute for special access while continuing to make such UNEs available for the purpose of providing local exchange service.

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U S WEST, Inc. ("U S WEST") submits these reply comments in response to the Commission's Fourth Further Notice of Proposed Rulemaking in this docket, as subsequently modified by the Commission's Supplemental Order.[1]

A number of IXC and CLEC commenters, seeking to preserve their potential opportunity to slash ILEC special access rates immediately to regulator-determined TELRIC prices, maintain that there is no legal authority or policy basis for the Commission to impose any limitations on their ability to do so. These arguments are without merit. As U S WEST explained in its opening comments, the "impairment" test set forth in section 251(d)(2) -- a provision that the IXC and CLEC commenters studiously ignore -- provides compelling legal authority for limiting the use of UNEs to provide special access, because a carrier seeking to provide (or self-provide) special access or its equivalent would not be materially impaired in the provision of *these*

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) ("UNE Remand Order" and "Fourth FNPRM"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, CC Docket 96-98, FCC 99-370 (rel. Nov. 24, 1999).

services by a lack of access to UNEs. In particular, a faithful application of the impairment test plainly would preclude a requesting carrier from "converting" existing special access to UNE pricing by requesting a mere billing change. Likewise, section 251(c)(3), by authorizing the Commission to impose just and reasonable conditions on the availability of UNEs, creates a sound and independent legal basis for the Commission to limit the conversion of special access services to UNEs. Imposing such a limitation would be consistent with the Commission's policy of promoting market-based (as opposed to prescriptive) access charge reform, maintain incentives for facilities-based competition in the delivery of access services, and avoid significant harm to universal service.

I. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO LIMIT THE AVAILABILITY OF UNEs AS A SUBSTITUTE FOR SPECIAL ACCESS SERVICE.

U S WEST explained in its initial comments that the impairment test of section 251(d)(2) and the "just and reasonable conditions" language of section 251(c)(3) provide strong and independent legal bases for limiting the availability of UNEs as a substitute for special access service. IXC and CLEC commenters, in their struggle to reach the opposite legal conclusion, ignore section 251(d)(2), ignore the impact of the Supreme Court's opinion in *Iowa Utilities Board*,[2] and ignore the fact that the Commission has already adopted use-related limitations in the context of the local switching UNE. They also play fast and loose with the language of section 251(c)(3).

A. There Is No Basis for the Claim That the 1996 Act Prohibits Any and All Limitations on the Purposes for Which UNEs Must Be Made Available.

A number of commenters urge the Commission to adopt the extreme and absolutist position that the 1996 Act inflexibly prohibits any and all limitations on the use of UNEs,

[2] *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999).

making the availability of UNEs an all-or-nothing proposition. For example, Cable & Wireless asserts that the 1996 Act "prohibits all limitations on the use of UNEs" and "unambiguously grants *any* 'telecommunications carrier' the right to use *any* UNE to provide *any* 'telecommunications service.'"[3] MCI WorldCom asserts that, "[o]nce the Commission has determined that an element should be unbundled . . . the Act requires ILECs to provide unlimited access to all of the functions and capabilities of that element for the provision of all telecommunications services."[4]

The Commission already rejected this absolutist interpretation of the Act in the UNE Remand Order. In addressing the unbundling obligations applicable to local circuit switching, the Commission refused to adopt an all-or-nothing approach and instead concluded "that it is appropriate to establish a more narrowly tailored rule to reflect significant marketplace developments."[5] Specifically, the Commission ruled that requesting carriers are entitled to obtain unbundled local circuit switching for many purposes, but not for the purpose of serving end users with four or more lines in certain high-density areas.[6] Thus, the availability of the local switching UNE in high-density areas depends on how the requesting carrier intends to use it: The carrier may obtain and use that UNE to serve customers with one to three lines in such areas, but not to serve customers with four or more. This ruling confirms that there is no room for the argument that the Act prohibits all limitations on the purposes for which UNEs may be used.

In any event, the specific statutory arguments offered by proponents of the absolutist reading are contrary to the plain language of the Act and the Supreme Court's decision in *Iowa*

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[3] Comments of Cable & Wireless at 3 (emphasis in original).

[4] Comments of MCI WorldCom at 3.

[5] UNE Remand Order ¶ 278.

[6] *See id.* ¶¶ 276-299.

Utilities Board. First, commenters arguing that the Act requires unbundling of elements in every market for every service base their statutory arguments principally on the language of section 251(c)(3) and ignore section 251(d)(2) entirely.[7] But the Supreme Court's decision in *Iowa Utilities Board* makes clear that the obligations imposed by that section apply only to the extent that the Commission has found specific UNEs to be subject to unbundling in the first place pursuant to the impairment standard of section 251(d)(2).[8] And the Court expressly held that that standard must be interpreted to impose meaningful limitations on the availability of UNEs.[9]

As U S WEST discussed in its opening comments, a faithful interpretation of the impairment standard, as construed by the Supreme Court, requires the Commission to consider the particular "services that [a requesting carrier] seeks to offer" and to mandate unbundling only where lack of access to UNEs would impair requesting carriers' ability to provide *those particular services.*[10] It follows that a UNE may be available for some purposes (the provision of services for which the impairment test is satisfied) but not others (the provision of services for which the impairment test is *not* satisfied). Thus, regardless of how one interprets the language of *section 251(c)(3)*, limitations on unbundling are authorized under *section 251(d)(2)*, and indeed are essential to the proper implementation of the impairment standard. Absent such limitations, requesting carriers would be able to obtain UNEs in many circumstances where the

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[7] *See, e.g.,* Comments of AT&T at 3; Comments of Cable & Wireless at 3; Comments of Sprint at 3-4.

[8] *See Iowa Utilities Board,* 119 S.Ct. at 734-36 (1999).

[9] *See id.* at 734 (stating that section 251(d)(2) is meant to impose a "limitation upon network-element availability"); *id.* at 736 (rejecting the Commission's position that the impairment standard does not "significantly diminish the obligation imposed by section 251(c)(3)").

[10] *See* 47 U.S.C. § 251(d)(2)(B); Comments of U S WEST at 2-4.

impairment test clearly is not satisfied with respect to "the services that it seeks to offer" -- a result directly at odds with the intent of Congress and the decision of the Supreme Court.[11]

In particular, where a carrier currently provides service successfully without using any UNEs, a lack of access to UNEs obviously does not materially impair the carrier's ability to provide the service. Thus, interexchange carriers like AT&T and MCI WorldCom, who today provide interstate services in a robustly competitive market without relying on UNEs, plainly cannot demonstrate that their ability to provide those services would be impaired within the meaning of section 251(d)(2) if they are not permitted to obtain special access -- an input of those services -- at UNE prices. The same analysis would apply to competitive access providers who successfully provide service today using tariffed special access circuits. In both cases, a faithful interpretation of section 251(d)(2) would dictate that UNEs need not be made available for the purpose of providing such services.

Moreover, section 251(c)(3) itself is not as absolute or inflexible as some commenters assert. Nothing in section 251(c)(3) expressly prohibits use-related limitations on the availability of UNEs. AT&T and other commenters attempt to demonstrate such a prohibition by repeatedly characterizing the section as giving requesting carriers the express right to use UNEs to provide "any" or "all" telecommunications services.[12] But the inclusion of "any" or "all" as modifiers of

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[11] The position that no limitations are permitted could lead to any number of absurd results. For example, suppose that a CLEC seeking to provide local exchange service in Illinois were to decide that U S WEST's switches in Minnesota were for some reason preferable to alternatives in Illinois. In the absence of use limitations, the CLEC, with appropriate transport arrangements, would be able to purchase unbundled switching in Minnesota for the purpose of remotely switching *Illinois* local exchange traffic. It strains credulity to suggest that Congress intended that a lack of access to U S WEST facilities in Minnesota could ever be treated as "impairing" a requesting carrier's ability to provide local service in a state entirely outside of U S WEST's region.

[12] *See* Comments of AT&T at 3 (asserting that section 251(c)(3) "specifically permits competitive LECs to use network elements to provide *any* 'telecommunications service'" (emphasis added));

"telecommunications service" is wholly an invention of the commenters -- in effect, an attempt to rewrite the statute to better serve their purposes. The actual text of section 251(c)(3) refers to "any" requesting carrier and "any" technically feasible point, but only "a" telecommunications service. In other words, while providing a telecommunications service is a necessary prerequisite for obtaining UNEs, it is by no means a sufficient one.

On the other hand, section 251(c)(3) does expressly state that the provision of unbundled elements is subject to "terms and conditions" that are "just, reasonable, and nondiscriminatory," and section 251(d) makes it clear that Congress intended the Commission to establish regulations to carry out the various provisions of section 251.[13] Accordingly, there is ample legal basis for the Commission to impose conditions necessary to ensure that unbundling does not undermine any of the goals or policies of the Act -- including, potentially, conditions that limit the purposes for which a particular UNE may be used.[14]

Some commenters resist this outcome on the theory that use-related limitations on UNE availability are foreclosed by section 251(c)(3)'s requirement that terms and conditions be "in accordance with . . . the requirements of this section."[15] But this latter requirement plainly does not itself prohibit use-related limitations (or anything else, for that matter); it merely clarifies that the "terms and conditions" referred to in section 251(c)(3) may not be used as a vehicle to achieve results that are prohibited by *other* provisions of section 251. Hence, the question becomes whether such a prohibition is contained elsewhere in the section. As discussed above,

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Comments of MCI WorldCom at 3 (asserting that "section 251(c)(3) of the Act requires ILECs to provide unlimited access . . . for the provision of *all* telecommunications services" (emphasis added)); Comments of Cable & Wireless at 3 (asserting that section 251(c)(3) grants the right to use UNEs "to provide *any* 'telecommunications service'").

[13] *See* 47 U.S.C. § 251(d)(1), (3).

[14] *See* Comments of U S WEST at 14-15.

[15] *See* Comments of AT&T at 3; Comments of Sprint at 7.

the prohibition that commenters purport to find does not comport with the actual statutory language, and there is no prohibition anywhere else in section 251.

A few commenters also suggest that the Act's definition of "network elements" as facilities and the functions and capabilities of those facilities necessarily implies that every UNE may be used for any purpose.[16] But the question of what a network element is or includes is entirely distinct from the questions of when and for what purposes a network element must be made available. There is no logical basis for asserting, simply because a network element is defined as a facility, or simply because the element's definition broadly includes functions and capabilities, that the availability of the element may not be limited. Imposing a use-related limitation on the availability of a UNE does not change the nature of the UNE itself, as commenters making this argument claim. It merely ensures that the UNE, however defined, will be available in appropriate circumstances but not others.

AT&T also argues that section 10(d), by specifying that the Commission may not forbear from applying the requirements of section 251(c), provides an additional basis for finding that use-related limitations are prohibited.[17] But no party to this proceeding has suggested that the Commission's *section 10 forbearance authority* supplies the legal basis for limiting the use of

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[16] *See* 47 U.S.C. § 153 (29) (defining "network element"); Comments of AT&T at 7-8 (asserting that use-related limitations on the availability of network elements "are inconsistent with the very concept of network elements"); Comments of MCI WorldCom at 4 (asserting that it follows from the definition of "network element" that, "once the Commission has concluded that an element should be unbundled, no further restriction based on the use to which the CLEC intends to put the element is allowed, so long as the element is used to provide a telecommunications service"); Comments of Cable & Wireless at 3 (asserting that [u]se-based distinctions . . . are incompatible with the fundamental nature of UNEs").

[17] *See* 47 U.S.C. § 160(d); Comments of AT&T at 7.

UNEs to substitute for special access.[18] Rather, U S WEST and others maintain that section 251 itself authorizes the Commission to impose such limitations. Thus, there is no forbearance issue, and section 10(d) is entirely irrelevant to this proceeding.

B. There Is No Merit to the Argument That the Commission's Prior Statements Concerning the Scope of Unbundling Requirements Somehow Foreclose the Commission's Ability Now To Limit the Purposes for Which Certain UNEs Must Be Made Available.

A number of commenters assert that the Commission has already decided that use-related limitations on the availability of UNEs are impermissible. These commenters cite portions of the Commission's 1996 First Report and Order in this docket ("First Local Competition Order") and argue that today, "[m]ore than three years later, nothing has changed that should affect [the Commission's] interpretation of the Act."[19]

First, the idea that "nothing has changed" since the Commission's analysis in the First Local Competition Order is absurd. Quite apart from the dramatic increase in competition in the market for access services, the Commission's initial unbundling analysis has been overtaken by the Supreme Court's 1999 decision in *Iowa Utilities Board.* As the Commission is well aware, the Court in that case held that an approach of effectively ordering "blanket access to incumbents' networks" fundamentally misconstrues the intent of Congress. Specifically, the Court explained that, if Congress had intended such blanket access, it would not have included

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[18] U S WEST did refer in its opening comments to two forbearance petitions it has filed pursuant to section 10, but only because those petitions help to show the advanced state of competition in the special access market.

[19] Comments of AT&T at 5; *see also id.* at 4-6; Comments of MCI WorldCom at 3, 5 ("No new facts or changed legal or policy analysis . . . have been presented to the Commission that provide grounds for it to reverse its position on this critical matter," *id.* at 5); Comments of KMC at 2; Comments of Global Crossing at 1-2; Comments of CompTel at 9-10.

the impairment test of section 251(d)(2) but instead would have simply said "that whatever requested element can be provided must be provided."[20] The Court continued:

> When the full record of these proceedings is examined, it appears that that is precisely what the Commission thought Congress had said. The FCC was content with its expansive methodology because of its misunderstanding of section 251(c)(3) . . . The Commission began with the premise that an incumbent was obliged to turn over as much of its network as was "technically feasible" . . . The Commission's premise was wrong.[21]

In arguing that the Act requires an ILEC to provide "unlimited access" to all of an element's functions and capabilities for all purposes,[22] MCI WorldCom and other commenters are in effect urging the Commission to ignore the Supreme Court and find once again that unbundling obligations are limited only by technical feasability.

In short, it is now clear that the Commission's 1996 analysis was based on an understanding of the Act's unbundling provisions that is substantially different from and inconsistent with the new and authoritative interpretation set forth in *Iowa Utilities Board.* In light of this crucial change in the Commission's understanding of the meaning of the Act, it is appropriate and indeed necessary for the Commission to revisit its earlier decisions concerning the scope of the Act's unbundling obligations. In particular, limitations on UNE availability that may not have appeared warranted or lawful under the Commission's 1996 interpretation of the Act are now justified given the Court's clarification of the statute's meaning.

In any event, imposing a limitation on the ability of requesting carriers to substitute UNEs for special access would not constitute the reversal in policy that some commenters suggest. The Commission in 1996 said that section 251(c)(3) does not impose any use-related

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[20] *Iowa Utilities Board*, 119 S.Ct. at 735.

[21] *Id.* at 736.

[22] Comments of MCI WorldCom at 3.

limitations on the availability of UNEs -- in other words, that the statute itself does not automatically exclude any particular use of UNEs, so long as the use involves a telecommunications service.[23] The Commission also ruled that *ILECs* may not on their own initiative impose such limitations, either directly or indirectly by provisioning UNEs in ways that have the effect of limiting a requesting carrier's possible uses.[24]

U S WEST is not suggesting that the Commission reverse course and find that the statute *on its face* mandates specific use-related limitations on the availability of UNEs, or that ILECs may themselves elect to impose such limitations. Rather, the point is that the Act directs the *Commission* to impose such limitations under certain circumstances -- namely, when it finds that the impairment test is met for some services but not others, or when it finds that some such limitation would be just, reasonable, and nondiscriminatory within the meaning of section 251(c)(3). The Commission in 1996 simply did not address the extent of its own legal authority and indeed responsibility to limit the purposes for which UNEs are available.

The Commission in the First Local Competition Order also determined that requesting carriers may use UNEs to provide exchange access.[25] But the Commission plainly did *not* decide

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[23] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15634 ¶ 264 (1996) ("*Section 251(c)(3)* does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled elements." (emphasis added)).

[24] *See* 47 C.F.R. § 51.309(a) ("An *incumbent LEC* shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements" (emphasis added)); 47 C.F.R. § 51.307(c) ("An *incumbent LEC* shall provide a requesting telecommunications carrier access to an unbundled network element . . . in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element" (emphasis added)).

[25] *See* First Local Competition Order at 15679 ¶ 356 ("[S]ection 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves."); 47 C.F.R. § 51.309(b) ("A telecommunications carrier

that requesting carriers may use UNEs to provide exchange access *exclusively*. The Commission explained that, notwithstanding its decision that UNEs may be used for exchange access, a requesting carrier generally will be able to use loop and local switching UNEs for that purpose only where the carrier also provides the customer with local exchange service.[26] Subsequently, the Commission opened a rulemaking proceeding asking "whether requesting carriers may use unbundled dedicated or shared transport facilities in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service."[27] In short, while the First Local Competition Order gave requesting carriers the right to use UNEs to provide exchange access, the Commission has never determined that right to be absolute. Therefore, limiting the ability of requesting carriers to use UNEs as a substitute for special access would not reverse prior Commission policy with respect to the use of UNEs to provide access services; it merely would add a new exception.

Moreover, the fact that the Commission failed to carve out a special access exception before in no way prevents the Commission from doing so now. As the Supreme Court has explained, "an agency must be given ample latitude to adapt their rules and policies to the

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purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.").

[26] *Id.* At 15679 ¶ 357 ("[I]nterexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Order on Reconsideration, 11 FCC Rcd 13042, 13048-49 ¶¶ 12-13 (1996) ("Although we concluded in the *First Report and Order* that requesting telecommunications carriers are permitted under the 1996 Act to purchase unbundled elements for the purpose of providing exchange access . . . as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier.").

[27] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12496 ¶ 61 (1997).

demands of changing circumstances."[28] Indeed, in appropriate circumstances the agency is *required* to revisit its rules.[29] In addition to the substantial change in the Commission's approach to the statute occasioned by *Iowa Utilities Board*, discussed above, there has been significant progress since the First Local Competition Order in the degree of competition in the market for special access services. In 1995, competitive providers of special access services had revenues totaling approximately $500 million; by 1999, those revenues had exploded to an estimated $5.7 billion.[30] This burgeoning competition is directly relevant both to the impairment analysis required by section 251(d)(2) and to an analysis of what would constitute a "just and reasonable" condition on unbundling within the meaning of section 251(c)(3). In light of this competition, the Commission reasonably could -- and indeed should -- conclude that a special access limitation that might not have been warranted in 1996, even had the Commission properly interpreted the Act's unbundling provisions, would be warranted now.

II. PERMITTING THE UNRESTRICTED CONVERSION OF SPECIAL ACCESS TO UNES WOULD HAVE SERIOUS ADVERSE POLICY CONSEQUENCES.

Commenters favoring unrestricted conversion and arbitrage, ignoring the fact that the special access market is already widely competitive, argue that limiting the availability of UNEs as a substitute for special access would thwart the Commission's market-based process for reforming access charges, slow the development of competition, or raise serious administrability issues. None of these arguments has merit. In fact, such a limitation is essential to the preservation of both the Commission's market-based approach to reform and competing carriers'

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[28] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (internal quotation marks omitted) (quoting *Permian Basin Area Rate Cases,* 390 U.S. 747, 784 (1968)).

[29] *See Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) (per curiam); *see also Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998).

[30] Special Access Fact Report (submitted with Comments of USTA) at 6; *see also* Comments of U S WEST at 7-10.

incentives to continue to invest in competitive special access facilities. A special access limitation also would play an important role in protecting universal service and would be far easier to administer these commenters suggest.

A. Far from Being Consistent with the Commission's Efforts to Reform Access Charges, Permitting the Unrestricted Conversion of Special Access to UNE Pricing Would Amount to the Abandonment of the Commission's Market-Based Approach to Access Reform and Result in Prices Being Set by Regulators Rather Than Competition.

AT&T and MCI WorldCom point out that the Commission's market-based approach to access charge reform seeks to allow competition, including UNE-based competition, to drive access rates to cost-based levels. They maintain that the conversion of special access to UNE pricing is an example of the competition on which the Commission's approach relies, and therefore that such conversion should be freely permitted.[31]

AT&T and MCI WorldCom have it precisely backwards. Driving special access rates down by permitting carriers to demand that services they currently obtain at tariffed rates be made available immediately at regulator-prescribed TELRIC prices would be the antithesis of the market-based approach described in the Commission's First Access Reform Order.[32] That approach sought to rely on actual marketplace competition -- the entry into the market of new providers offering alternatives to an ILEC's services, reducing the ILEC's market share and forcing the ILEC to lower its prices in response.[33] Ordering ILECs to bill their special access

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[31] *See* Comments of AT&T at 8, 10; Comments of MCI WorldCom at 9, 13.

[32] *Access Charge Reform,* First Report and Order, 12 FCC Rcd 15982 (1997) ("First Access Reform Order").

[33] *See id.* at 16096 ¶ 265 ("As customers choose providers other than incumbent LECs as their local providers, interstate access services will come to be priced competitively. Incumbent LECs will have to respond to competitors' offerings with lower-priced access services of their own in

customers at a lower rate for the same services has nothing to do with such competition. The access market is not suddenly more competitive simply because AT&T requests that a special access functionality that it currently purchases at tariffed rates be repriced at UNE rates: AT&T may receive a lower price, but this neither reflects nor results in any change in the number of participants in the special access market, their relative market shares, or any other measure of actual marketplace competition.

Indeed, permitting the unrestricted conversion of special access to UNEs would be equivalent to jettisoning the market-based approach and replacing it with precisely the prescriptive approach that the Commission rejected. The Commission was clear that the market-based approach was expected to yield a gradual process of adjustment.[34] The end result of that process would be economically rational prices *as determined by market forces*. The Commission recognized that a prescriptive approach could yield a more immediate impact on prices, but it rejected such an approach on the ground that any regulatory estimate of a competitive price would necessarily be imprecise and inferior to prices set by market forces. The Commission emphasized this point repeatedly:

- "[M]arkets are far better than regulatory agencies at allocating resources and services efficiently for the maximum benefit of consumers."[35]
- "[W]e believe that emerging competition will provide a more accurate means of . . . moving access prices to economically sustainable levels."[36]

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order to retain customers that would otherwise switch to competitors' networks, further increasing the effect of competition on overall access charge payments.").

[34] *See, e.g., id.* at 16003 ¶ 47 ("[T]his Order establishes a *process* that will eliminate some implicit subsidies . . . *gradually*" (emphasis added)); *id.* At 16099 ¶ 274 ("As competition emerges, the market-based approach will permit access charges to move towards the levels that will prevail in competitive markets.").

[35] *Id.* at 16001 ¶ 42.

- "[L]acking the tools for making accurate prescriptions, precipitous action could lead to significant errors in the level of access charge reductions necessary to reach competitive levels. . . . Consequently, we strongly prefer to rely on the competitive pressures unleashed by the 1996 Act to make the necessary reductions."[37]

- "[C]ompetition will do a better job of determining the true economic cost of providing [access] services."[38]

- "A market-based approach to rate regulation should produce, for consumers of telecommunications services, a better combination of prices, choices, and innovation than can be achieved through rate prescription."[39]

Permitting the unrestricted conversion of special access to UNE rates would result in an immediate flash cut of special access prices to TELRIC, not a gradual process of price adjustment as envisioned by the market-based approach.[40] And most importantly, the prices that

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[36] *Id.* at 16001-02 ¶ 44.

[37] *Id.* at 16002 ¶ 46.

[38] *Id.* at 16096 ¶ 265.

[39] *Id.* at 16107 ¶ 289.

[40] MCI WorldCom argues that there is little risk of a flash cut in special access prices. MCI WorldCom first suggests that IXCs and CLECs are not likely to take prompt advantage of the arbitrage opportunity that special access conversion would represent, based on MCI WorldCom's view that there so far has been "virtually no erosion of the ILEC customer base for access services." Comments of MCI WorldCom at 14-15. But the opportunity to engage in such arbitrage, if granted, would be brand new; thus, it makes no sense to say that a lack of such arbitrage activity in the past indicates that it will not occur in the future. Indeed, U S WEST has already received multiple requests from carriers seeking to convert special access services to UNE prices. Moreover, it is simply false to suggest that there has been no erosion of the ILECs' position in the special access market. As discussed in U S WEST's opening comments and in the Special Access Fact Report submitted by USTA, special access competitors are numerous, aggressive, and successful. The idea that they would fail to capitalize on a major arbitrage opportunity cannot be taken seriously.

MCI WorldCom also says that long-term access contracts and termination penalties would prevent CLECs from converting all of their special access lines to UNEs overnight. Comments of MCI WorldCom at 15. While this may be true, it remains the case that, as each contract expires, all special access circuits covered by that contract would be immediately flash cut to UNE prices. There would be nothing gradual about any of the price changes. Moreover, the immediate impact still would be tremendous: The ILEC revenue impacts set forth in the

would result from such conversions would be the TELRIC prices prescribed by regulators, not prices determined by market forces. In short, permitting such conversions would be equivalent to reducing special access rates through a rate prescription -- the very option that the Commission has said cannot be counted on to produce economically rational results.

Adopting this type of prescriptive approach is particularly unwarranted in the case of special access services. The Commission's approach to access reform recognizes that, "where competition is developing, it should be relied on in the first instance to protect consumers and the public interest."[41] As discussed in U S WEST's opening comments and in the Special Access Fact Report submitted with the comments of USTA, competition in special access services is well established and is continuing to develop rapidly. That competition naturally will drive prices towards cost-based levels. The Commission should not short-circuit this market-based process by effectively flash cutting special access to regulator-determined prices.

B. Limiting the Ability of Requesting Carriers To Obtain Special Access at UNE Prices Would Promote Competition in the Special Access Market, Not Harm It.

AT&T and MCI WorldCom argue that limiting the ability of requesting carriers to obtain special access at UNE prices would be anticompetitive.[42] In fact, the opposite is true: As U S WEST discussed in its opening comments, immediately slashing special access rates to TELRIC on a widespread basis would devastate the existing facilities-based competitive access business, fatally undermine the business case for additional facilities investment, and increase dependence

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Special Access Fact Report take full account of the extent to which contractual obligations may prevent immediate conversion of some circuits.

[41] First Access Reform Order at 16002 ¶ 44; *see also id.* at 16094 ¶ 263 ("[W]here competition develops, it should be relied upon as much as possible to protect consumers and the public interest.").

[42] *See* Comments of AT&T at 11; Comments of MCI WorldCom at 14.

on ILEC facilities.[43] Time Warner, a facilities-based competitor that is not affiliated with a major IXC, confirms this analysis, explaining that "a flash-cut to TELRIC-based prices for [special access] services would substantially reduce [Time Warner's] incentive to expand its entry in the 21 markets it has already entered or to invest in network facilities in new geographic areas."[44] Time Warner goes on to observe that, if the Commission permits the flash cut of special access rates to TELRIC, "the framework for facilities-based entry would collapse."[45]

AT&T argues otherwise, reasoning that, because a new entrant makes investment decisions based on the prices it expects to prevail in the *future*, a reduction in current access charges will not necessarily affect its entry strategy.[46] But even if one focuses on expected future prices, it is impossible to avoid the conclusion that a rule that permits any requesting carrier to obtain special access from the ILEC at TELRIC prices would discourage investment in facilities. Only in a hypothetical world of perfect competition would a potential investor expect that future prices will always be set precisely at forward-looking cost. Indeed, facilities-based competitive access providers in U S WEST's region generally provide service at rates that are about 40 percent higher than TELRIC, and presumably do not base future investment decisions on the assumption that rates will immediately fall to TELRIC and will remain there for the life of the proposed facility. Put another way, it would be impossible for providers constructing real-world networks to compete with prices based on the cost of a hypothetical, ideally efficient network using only the most advanced technology and created from scratch at a single point in time rather

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[43] *See* Comments of U S WEST at 19-20.

[44] Comments of Time Warner at 19. Facilities-based competitors that are affiliated with major IXCs are unlikely to voice such concerns, because the arbitrage opportunity may be worth more to them than the continued viability of their facilities-based entry strategy.

[45] *Id.* at 22.

[46] Comments of AT&T at 10-11.

than (as real networks are) on a gradual, piecemeal basis. But if UNEs are made available as a substitute for special access on an unlimited basis, potential investors will face just that prospect, because the recovery on new investment will be limited to TELRIC right from the start.

Thus, there is no basis for AT&T to jump from the premise that relatively high current access rates will not *always* justify investment in facilities to the conclusion that immediately slashing rates all the way to TELRIC will have *no impact* on investment. Moreover, AT&T ignores the fact that TELRIC is a regulatory prescription and hence may not be a perfect reflection of an accurate competitive price. The Commission has recognized the risk that regulator-prescribed prices may "create and maintain distortions in the investment decisions of competitors as they enter local telecommunications markets."[47]

MCI WorldCom's specific competition-related arguments are no stronger. First, MCI WorldCom argues that limiting the availability of UNEs as a substitute for special access will, together with the access pricing flexibility granted by the Commission, "give ILECs a license to engage in price squeezes."[48] But the Commission has considered and rejected the argument that prescriptive access charge reductions are needed to avert the risk of a price squeeze, and the Commission's rules grant pricing flexibility only where there is sufficient competition to constrain anticompetitive behavior.[49] MCI WorldCom next hypothesizes a threat to "CLECs' ability to use their own switching" if CLECs are prevented from using "dedicated leased

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[47] First Access Reform Order at 16094 ¶ 263.

[48] Comments of MCI WorldCom at 16.

[49] *See* First Access Reform Order at 16100-04 ¶¶ 275-82; *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14225 ¶ 3 (1999) ("The pricing flexibility framework we adopt in this Order is designed to grant greater flexibility to price cap LECs as competition develops, while ensuring that . . . price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior.").

facilities . . . to carry local traffic to their switches."[50] But a limitation on the use of UNEs for special access would not prevent CLECs from using (as in fact they do today) leased transport facilities in any manner they choose; the only consequence would be that, where a CLEC uses a facility predominantly for access rather than local traffic, the CLEC would pay the tariffed price rather than the UNE price. UNE prices would be available for any facility used predominantly for local traffic.

Finally, MCI WorldCom argues that "[u]se restrictions also harm competition because ILECs refuse to allow CLECs to combine leased UNEs with access services they purchase from the ILECs."[51] Contrary to MCI WorldCom's suggestion, U S WEST does not prevent any CLEC from combining UNEs with access services. U S WEST stands ready to deliver both UNE circuits and tariffed special access circuits to a requesting carrier's collocation space, where the CLEC is then free to connect circuits as it sees fit. What U S WEST will *not* do is combine UNE circuits and tariffed service circuits on a requesting carrier's behalf, or convert a *portion* of an existing tariffed circuit to UNE prices -- acts that are neither necessary for competition nor required by the statute.

In the end, the competition-related concerns raised by both sides are best addressed through a faithful application of the impairment test of section 251(d)(2). Where requesting carriers would suffer material impairment in their ability to provide the particular services they seek to offer, requiring access to UNEs promotes competition. Where requesting carriers would not suffer material impairment -- as, for example, when there are adequate alternative sources of the facility or function in question -- competition is best served by not requiring access to

[50] Comments of MCI WorldCom at 16-17.

[51] Comments of MCI WorldCom at 17.

UNEs.[52] AT&T and MCI WorldCom overlook the impairment standard entirely, and with good reason: There simply is no plausible argument that their ability to provide their already well established and nationwide interexchange service offerings would be materially impaired if they are not able to obtain special access at UNE prices. It likewise is clear from the rapid development of competition in the special access marketplace that a lack of access to UNEs for special access purposes would not materially impair carriers seeking to provide competitive access services.

C. Contrary to the Argument of Some Commenters, the Universal Service Consequences of Permitting the Immediate and Unrestricted Conversion of Special Access to UNEs Would Be Real and Significant.

Some commenters argue that special access rates do not contain universal service subsidies, and that permitting the unlimited substitution of UNEs for special access service thus would pose no threat to universal service.[53] AT&T similarly suggests that any universal service subsidies embedded in special access rates are of small magnitude and are the result of ILECs' voluntary decisions to take advantage of a "flowback" mechanism which allows the ILECs to recover certain costs through special access rather than through retail rates.[54]

As a preliminary matter, there is no serious dispute that unlimited substitution of UNEs for special access services would have a substantial negative impact on ILECs' special access revenues. Reduced special access revenues inevitably would lead to lower levels of ILEC investment, particularly since rapid growth in the special access market has been and continues to be a major driver of such investment. Over time, the reduced levels of investment would have serious implications for ILECs' ability to provide quality service on a ubiquitous basis.

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[52] *See Iowa Utilities Board*, 119 S.Ct. at 753-54 (Breyer, J., concurring).

[53] *See, e.g..,* Comments of Cable & Wireless at 7-8; Comments of CompTel at 4-8.

[54] Comments of AT&T at 13 & nn. 14-15.

In any event, the decisions cited by commenters do *not* demonstrate that special access rates contain little or no cross-subsidies. Rather, the commenters succeed in showing only that (i) the Commission generally seeks to avoid rate structures that *explicitly* cause special access rates to subsidize other services, and (ii) the amount of implicit subsidy resulting from the various intricacies of the overall rate regime -- including the access charge structure, the jurisdictional separations process, and rate averaging rules[55] -- is extremely difficult to identify with precision.

As to point (i), the Commission in the First Access Reform Order noted its general policy against straightforward special access cross-subsidies, although it did so in the context of a decision creating a new (albeit temporary) cross-subsidy of that very sort.[56] The "voluntary" subsidy cited by AT&T is another example of an exception to the general policy.

The 1992 Expanded Interconnection Order[57] cited by several commenters serves to demonstrate point (ii) -- namely, that implicit subsidy flows resulting from the complex and interrelated workings of the various components of the rate regime are extremely difficult to unscramble. The Commission in that order did not, as some commenters would have it,[58] say that the particular support flow eliminated in that proceeding was the only support embedded in special access rates. Rather, the Commission said that it could not identify any other support

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[55] *See Federal-State Joint Board on Universal Service*, Seventh Report and Order and Thirteenth Order on Reconsideration, 14 FCC Rcd 8078, 8136-37 ¶¶ 124-125 (1999) ("Seventh Universal Service Order") (observing that rate structure rules, separations rules, and averaging rules all contribute to implicit support flows).

[56] *See* First Access Reform Order at 16155 ¶ 404.

[57] *Expanded Interconnection with Local Telephone Company Facilities,* Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992).

[58] Comments of Cable & Wireless at 7; Comments of CompTel at 7.

flows "[b]ased on the present record."[59] The Commission acknowledged that there might well be other support flows and left open to ILECs the possibility of coming forward to document such cross-subsidies.[60] The fact that ILECs have not done so merely reflects the Herculean nature of sufficiently untangling the web of cross-subsidies to show precisely which services subsidize which other services, and to what extent. Indeed, as U S WEST discussed in its opening comments, the Commission itself has yet to complete the task of identifying implicit cross-subsidies, even though it has been working on the matter since 1997.[61]

While the precise amounts of implicit cross-subsidies embedded in any particular rate are difficult to document, it is clear that special access rates are one significant component of a rate system that is, by the Commission's own admission, rife with cross-subsidies.[62] AT&T dismisses the problem with the suggestion that, "to the extent that current access charges contain universal service subsidies, . . . the Commission [is required to] create an explicit, non-discriminatory and competitively neutral support fund to recover them *in the future.*"[63] But it makes no sense to slash one component of that system to cost (or more precisely, a regulatory estimate of cost) in advance of the completion of comprehensive reform to address implicit subsidy issues on a

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[59] Expanded Interconnection Order at 7437 ¶ 147.

[60] *Id.* at 7436 ¶ 145 ("LECs' rates for various access services may reflect certain regulatorily mandated support mechanisms designed to achieve social policy objectives."); *id.* at 7437 ¶ 147 ("LECs asserting that other support flows exist and seeking to reflect them in a contribution charge must obtain Commission approval prior to filing tariffs designed to implement such a charge.").

[61] *See* Comments of U S WEST at 17 & n.40.

[62] *See, e.g.,* Seventh Universal Service Order at 8081 ¶ 6.

[63] Comments of AT&T at 16 (emphasis added).

system-wide basis. As MCI WorldCom concedes, that system-wide reform has not yet been completed.[64]

Furthermore, regardless of the extent of cross-subsidies embedded in special access rates, permitting unrestricted conversion of special access to UNEs would have a significant impact on ILECs' ability to collect universal service support embedded in *switched* access rates. As the Commission has acknowledged, relatively low special access prices would cause users of the switched network to migrate to special access arrangements.[65] If special access were suddenly made available at TELRIC prices, many business customers that today buy switched access would start buying special access instead, thus significantly reducing the business user revenues that subsidize lower rates for residential service.

D. The Administrability Concerns Expressed by Some Commenters Are Greatly Overstated.

Several commenters say that the adoption of a use-related limitation on the availability of UNEs would raise serious administrability issues. Specifically, these commenters caution that, every time a carrier requests a UNE, there would be a major dispute over whether or not the UNE is being used for a permissible purpose.[66]

There should be no great difficulty in establishing simple rules that minimize such concerns. Specifically, a requesting carrier should be required to provide a certification containing sufficient information to verify that the requested UNEs will be used predominanly for local traffic. Upon receiving the necessary certification, the ILEC would be required to make

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[64] *See* Comments of MCI WorldCom at 12.

[65] *See* First Access Reform Order at 16024, 16154 ¶¶ 103, 401-402.

[66] *See* Comments of AT&T at 12; Comments of MCI WorldCom at 15; Comments of CompTel at 14-16.

the UNEs available. To ensure that requesting carriers comply with the terms of their certifications, the Commission should permit ILECs to engage in "spot checks," which would involve reviewing requesting carriers' circuit records in a reasonable number of instances. (In addition, the Commission's new Enforcement Bureau could be given a role in verification.) If a carrier is found to be violating the terms of its certification, it should be held liable for substantial financial penalties, including a fine to the Commission and damages to the ILEC consisting of the full amount of prior underpayments caused by the carrier's misrepresentation. Such penalties should be set so as to deter violations, making the certification system effectively self-enforcing in the vast majority of cases.

The administrability concerns expressed by some commenters are thus greatly exaggerated. But in any event, a desire for simplicity and ease of administration is no excuse for adopting a radically overinclusive rule that gives "blanket access" to UNEs for special access purposes despite the fact that a lack of access to UNEs does not materially impair a requesting carrier's ability to provide special access services within the meaning of section 251(d)(2). Administration issues are relevant and important, but they do not justify ignoring the requirements of the Act as interpreted by the Supreme Court.

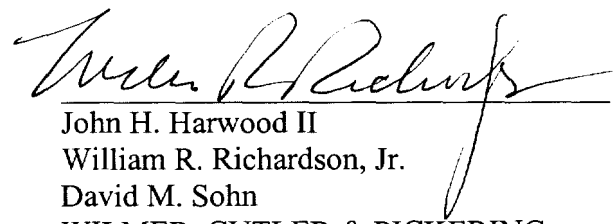
III. THE COMMISSION SHOULD ADOPT A CLEAR LIMITATION ON THE AVAILABILITY OF UNEs AS SUBSTITUTES FOR SPECIAL ACCESS.

For the reasons discussed above and in U S WEST's opening comments, the Commission should adopt a rule that limits the availability of loop and transport UNEs as a substitute for special access while continuing to make such UNEs available for the purpose of providing local exchange service, local exchange service together with the associated exchange access, and advanced services using xDSL technology. Specifically, U S WEST proposes that the availability of loop and transport facilities as UNEs should be limited to situations where the

facilities are used predominantly for local service. The Commission should adopt a presumption that a facility is used "predominantly" for local service if it terminates the majority of its capacity in a local exchange switch. The Commission likewise should adopt a presumption that a facility is *not* used predominantly for local service if the facility runs to a POP where the majority of the facility's capacity is either (i) terminated at a switch used mainly to route toll traffic, or (ii) multiplexed onto an unswitched, point-to-point circuit.

U S WEST believes that such a rule could be administered without difficulty using a certification system of the type discussed above in Part II.D. And most importantly, such a rule would faithfully implement the impairment test of section 251(d)(2) in the manner envisioned by the Supreme Court: Requesting carriers would be entitled to UNEs in circumstances where failure to get the UNEs would truly impair the carriers' ability to provide service, but not in circumstances where the requesting carriers' primary goal in seeking UNEs is merely to obtain special access, a functionality that carriers can readily obtain from non-ILEC sources.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that on this 18th day of February, 2000, I caused true and correct copies of the foregoing Reply Comments of U S WEST, Inc., to be served by hand* or by first class mail, postage prepaid, upon the following parties:

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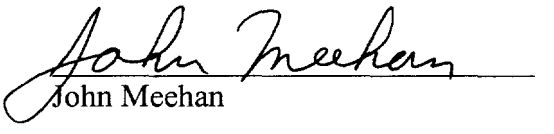
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